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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 IN RE: PHENYLPROPANOLAMINE
8 (PPA) PRODUCTS LIABILITY
9 LITIGATION,

MDL NO. 1407

10 This document relates to:
11 See Appendix A

ORDER GRANTING DEFENDANT
CHATTEM, INC.'S AND THE
DELACO COMPANY'S MOTION TO
DISMISS FOR PLAINTIFFS'
FAILURE TO COMPLY WITH
COURT-ORDERED DISCOVERY

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13 THIS MATTER comes before the Court on Chattem, Inc. and The
14 Delaco Company's (collectively, "defendants") September 10, 2003
15 Motion to Dismiss for Plaintiffs' Failure to Comply with Court-
16 Ordered Discovery. On March 18, 2002, the Court entered Case
17 Management Order ("CMO") No. 6 in which the Court set a schedule
18 and protocol for conducting all case-specific fact discovery
19 within MDL 1407. Specifically, CMO No. 6 requires each plaintiff
20 to complete a Plaintiff Fact Sheet ("PFS") and serve it upon
21 Defendants within forty-five days of receipt of the PFS. Defen-
22 dants now move pursuant to Federal Rules of Civil Procedure 37
23 and 41 to dismiss the plaintiffs identified in Appendix A of this
24 Order.

25 The history of this motion merits brief explanation. On July
26 17, 2003, defendants filed a motion to dismiss the claims of

1 plaintiffs subject to this motion, among others. That motion was
2 unopposed, and it was granted on August 20, 2003. Subsequently,
3 however, defendants were made aware of the concerns of certain
4 plaintiffs regarding service of the July 17, 2003 motion, and the
5 parties jointly requested that the Court set aside the August 20,
6 2003 Order. On September 15, 2003, this Court set aside the
7 August 20, 2003 Order. Defendants re-filed their motion on
8 September 10, 2003, noting that in the interim, some plaintiffs
9 had served fact sheets, and that these plaintiffs, although
10 included in the July 17, 2003 motion, were omitted from the
11 September 10, 2003 motion. Further, between defendants' re-filing
12 of their motion and the present time, the motion has become moot
13 as to all but the following plaintiffs listed on Appendix A to
14 this Order: Lola Whitehead, Jerry Bates, Elvira Tollman, Helen
15 Green, Enter Renoir, Eileen M. Wright, and William Huff. Having
16 reviewed the pleadings filed in support of and in opposition to
17 this motion, the Court finds and rules as follows:

18 I. DISCUSSION

19 Before dismissing a case for non-compliance with court-
20 ordered discovery, the Court must weigh five factors: (1) the
21 public's interest in expeditious resolution of litigation; (2)
22 the court's need to manage its docket; (3) the risk of prejudice
23 to the defendants; (4) the public policy favoring disposition of
24 cases on their merits; and (5) the availability of less drastic
25 sanctions. Malone v. United States Postal Serv., 833 F.2d 128,
26 130 (9th Cir. 1987). In the present case, plaintiffs have failed

1 to file fact sheets as required by CMO No. 6. Accordingly, the
2 Court finds that dismissal is appropriate in light of the factors
3 set forth in Malone.

4 First, both the public's interest in the expeditious resolu-
5 tion of litigation and the court's need to manage its docket
6 dictate dismissal. The plaintiffs subject to this Order have
7 failed to fulfill their obligation to move their cases forward.
8 Such lack of diligence does not serve the public interest in
9 expeditious resolution of litigation. See Nourish v. California
10 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("dismissal in this
11 instance serves the public interest in expeditious resolution of
12 litigation as well as the court's need to manage the docket
13 because Plaintiff's noncompliance has caused the action to come
14 to a complete halt, thereby allowing Plaintiff to control the
15 pace of the docket rather than the Court").

16 Second, the unreasonable delay in completing the fact sheets
17 prejudices the Defendants' ability to proceed with the cases
18 effectively. The PFS is designed to give each defendant the
19 specific information necessary to defend the case against it.
20 Without that discovery device, a defendant is unable to mount its
21 defense because it has no information about the plaintiff or the
22 plaintiff's injuries outside the allegations of the complaint.
23 The unreasonable delay in producing this information, therefore,
24 severely prejudices the Defendants, warranting dismissal.
25 Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002).

26 Third, inasmuch as the disposition of cases should be on the

1 merits, here, in light of the inability of the named plaintiffs
2 to provide any information regarding the critical elements of
3 their claims, it is impossible to dispose of the case on the
4 merits. Plaintiffs are uniquely in the possession of the infor-
5 mation being sought. Their inability or unwillingness to furnish
6 this information is not excusable. See In re Exxon Valdez, 102
7 F.3d 429, 433 (9th Cir 1996) ("policy [of disposing cases on
8 their merits] lends little support to appellants, whose total
9 refusal to provide discovery obstructed resolution of their
10 claims on the merits.").

11 Last, there are no less drastic sanctions remaining. All
12 the plaintiffs at issue have received warning letters from the
13 defendants. The Court has already imposed the sanction of
14 preventing remand of the cases where discovery requirements have
15 not been met. See CMO 10 ¶ 2 (Nov. 21, 2002). The Court also
16 ordered that the time for completing case-specific discovery will
17 not begin to run until a substantially complete PFS has been
18 provided to defendants. Id. ¶ 3. In the situation where the
19 Court has been lenient and provided plaintiffs with second and
20 third chances following procedural defaults, "further default[]
21 may justify imposition of the ultimate sanction of dismissal with
22 prejudice." Malone, 833 F.2d at 132 n.1 (quoting Callip v.
23 Harris County Child Welfare Dep't, 757 F.2d 1513, 1521 (5th Cir.
24 1985)).

25 The Court received an opposition on behalf of only one of
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1 the plaintiffs, William Huff.¹ Huff argues that his PFS was
2 served on September 15, 2003. Huff's PFS, however, was due on May
3 8, 2003, and defendants sent him a warning letter on May 12,
4 2003. Huff did not serve his PFS until five days *after* defendants
5 re-filed this motion. His delay in providing this information is
6 inexcusable for all the reasons stated above.

7 Accordingly, the Court finds it appropriate to dismiss the
8 named plaintiffs' claims against defendants with prejudice. For
9 the foregoing reasons, defendants' motion to dismiss for failure
10 to comply with court-ordered discovery is GRANTED. The claims by
11 the plaintiffs listed in Appendix A against Chattem, Inc. and The
12 Delaco Company are DISMISSED with prejudice.

13 DATED at Seattle, Washington this 20th day of January, 2004.

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15
16 s/ Barbara Jacobs Rothstein
17 BARBARA JACOBS ROTHSTEIN
18 UNITED STATES DISTRICT JUDGE
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23 ¹Another opposition was filed on behalf of some plaintiffs
24 with regard to whom this motion is now moot. Therefore, the Court
25 need not resolve the dispute that arose regarding whether that
26 opposition was filed in a timely manner. In addition, Plaintiffs'
Motion for Leave to File a Surreply is moot, because defendants'
motion is moot as to the plaintiffs seeking leave.

APPENDIX A

Docket Number	Plaintiff Name
02-1371	Lola Whitehead
02-1760	Jerry Bates
02-1857	Elvia Tillman
02-1858	Helen Green
02-1859	Etter Lenoir
03-1880	Eileen M. Wright
03-74	William Huff